TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 581.

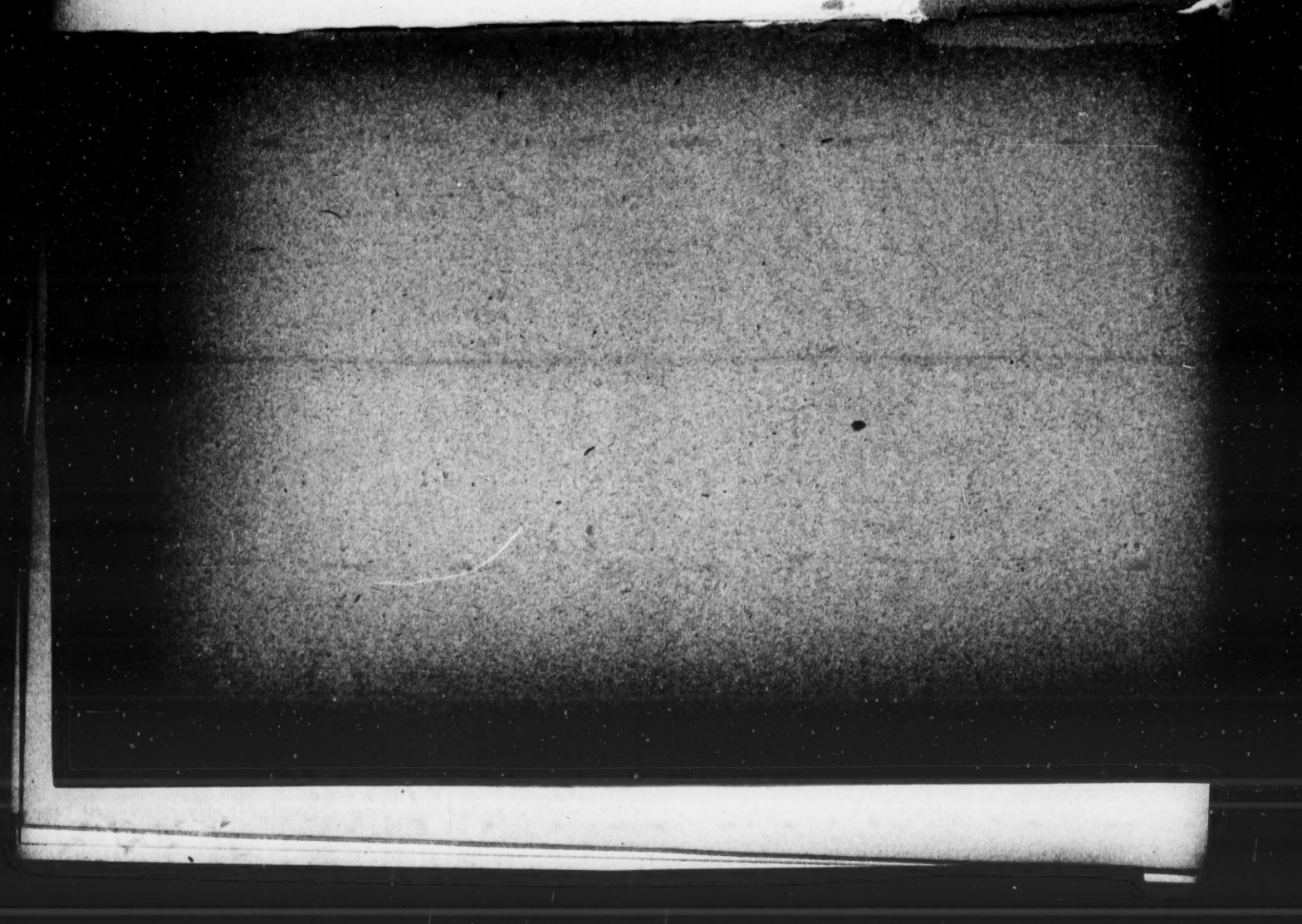
THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN BURNS AND JOHN C. NOKES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JULY 2, 1888.



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1 THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the city of Baltimore, on the first Monday of November, being the second day of the same month, in the year of our Lord one thousand eight hundred and eighty-five—present, the Honorable Hugh L. Bond, circuit judge; Archibald Stirling, Jr., Esquire, attorney; Jno. M. McClintock, Esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

JOHN BURNS and JOHN G. NOAKES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the 16th day of May, 1885, the judges of the circuit court for Dorchester county transmitted to the said circuit court here transcript of the record
2 and proceedings of a plea therein lately depending before them, which is as follows, to wit:

Record.

STATE OF MARYLAND, } *sct:*
Dorchester County, }

At a circuit court of the first judicial circuit of the State of Maryland, begun and held at the court-house, in the town of Cambridge, in and for Dorchester county aforesaid, on the fourth Monday in April (it being the twenty-seventh day of the same month), in the year of our Lord one thousand eight hundred and eighty-five, were present the Honorable Levin T. H. Irving, chief judge; Thomas A. Melvin, Esquire, sheriff; Charles Lake, clerk.

In the record of proceedings of said court, among others, were the following, to wit:

JOHN BURNS and JOHN G. NOAKES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the second day of February, in the year last aforesaid, the following record of proceedings in said cause in the circuit court for Cecil county, Maryland, was filed in our court here, to wit:

STATE OF MARYLAND, } *sct:*
Cecil County, }

3 At a circuit court of the second judicial circuit of the State of Maryland, begun and held at the court-house, in the town of Elkton, in and for Cecil county aforesaid, on the second Monday in December (it being the eighth day of the same

month), in the year of our Lord one thousand eight hundred and eighty-four, were present the Honorables Joseph A. Wicks, Frederick Stump, associate judges; William A. Smith, Esquire, sheriff; James A. Davis, clerk.

In the record of proceedings of said court, among others, appear the following, to wit:

JOHN BURNS and JOHN G. NOAKES

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the twenty-third day of February, in the year eighteen hundred and eighty-four, the said John Burns and John G. Noakes, by Albert Constable, Esquire, their attorney, prosecuted and sued forth out of the circuit court here the writ of the State of Maryland of summons against the said The Baltimore and Ohio Railroad Company, and to the sheriff of Cecil county aforesaid directed, in form following, to wit:

CECIL COUNTY, *ss:*

[L. S.] The State of Maryland to the sheriff of Cecil county, Greeting:

You are hereby commanded to summon The Baltimore and Ohio Railroad Company to appear before the circuit court
4 to be held at the court-house in Elkton, in and for Cecil county aforesaid, on the third Monday in March next, to answer unto John Burns and John G. Noakes in a plea of trespass on the case, &c.; and have you then and there this writ.

Witness the Honorable John M. Robinson, chief judge of said court, the 19th day of January, 1884.

Issued the 23rd day of February, 1884.

JAMES A. DAVIS, *Clerk.*

On which said third Monday in March, in the year aforesaid, being the day of the return of the aforesaid writ, come into the circuit court here the plaintiffs aforesaid, by their attorney aforesaid.

And the sheriff of Cecil county aforesaid, to wit, William J. Smith, Esquire, to whom the said writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"*Non est.*

"W. J. SMITH, *Sheriff.*"

And thereupon the said plaintiffs, by their attorney aforesaid, prosecuted and sued forth out of the circuit court here an *alias* writ of the State of Maryland of summons against the said defendant, to the sheriff of Cecil county directed, in form following, to wit:

CECIL COUNTY, *ss:*

[L. S.] The State of Maryland to the sheriff of Cecil county, Greeting:

You are hereby commanded to summon The Baltimore and Ohio Railroad Company to appear before the circuit court to be held at the court-house in Elkton, in and for Cecil county aforesaid, on the third Monday in June next, to answer unto John Burns and John G. Noakes in a plea of trespass on the case, &c.; and have you then and there this writ.

Witness the Honorable John M. Robinson, chief judge of said court, the 26th day of March, 1884.

Issued the 26th day of March, 1884.

JAMES A. DAVIS, *Clerk.*

At which said third Monday in June, in the year last aforesaid, being the day of the return of the aforeging *alias* writ, came into the circuit court here the plaintiffs aforesaid, by their attorney aforesaid.

And the sheriff of Cecil county aforesaid, to whom the said *alias* writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

Summond Col. H. T. Douglas, chief engineer of B. & O. R. R. Co.

W. J. SMITH, *Sheriff.*

But the said The Baltimore and Ohio Railroad Company does not come.

And thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said plaintiffs, by their attorney aforesaid, and by order the court here thereon, is continued until the third Monday in September next.

At which mentioned third Monday in September, in the year last aforesaid, until which day this cause was continued as aforesaid, come into the circuit court here the plaintiffs aforesaid, by their attorney aforesaid.

But the said defendant doth not come.

And thereupon further process of and upon the premises aforesaid between the parties aforesaid, by consent of the said plaintiffs, by their attorney aforesaid, and by order of the court here thereon, is continued until the second Monday in December next.

And thereupon, afterwards, to wit, on the thirteenth day of October, in the year last aforesaid, the plaintiffs aforesaid, by their attorney aforesaid, declare against said defendant in the plea aforesaid in form following, to wit:

STATE OF MARYLAND, *Cecil County*, } *To wit:*

In the Circuit Court for Cecil County.

1st. John Burns and John G. Noakes, trading as Burns and Noakes, by their attorney, Albert Constable, sue the Baltimore and Ohio Railroad Company for money payable for goods sold and delivered by the plaintiffs to the defendant.

2nd. And for goods bargained and sold by the plaintiffs to the defendant.

3rd. And for work done and materials provided by the plaintiffs for the defendant at its request.

4th. And for money lent by the plaintiffs to the defendant.

7 5th. And for money paid by the plaintiffs for the defendant at its request.

6th. And for money received by the defendant for the use of the plaintiffs.

7th. And for money found to be due from the defendant to the plaintiffs on accounts stated between them.

And the plaintiffs claim fifty thousand dollars.

ALBERT CONSTABLE,
Pl'ffs Att'y.

At which mentioned second Monday in December, in the year last aforesaid (being this present term), until which day this cause was last continued as aforesaid, come into the circuit court here the plaintiffs aforesaid, by their attorney aforesaid.

And the said defendant comes into court here by John S. Wirt, Esquire, its attorney.

And thereupon the said plaintiffs, by their attorney aforesaid, pray that the said defendant may answer to the declaration aforesaid of them, the said plaintiffs, in the plea aforesaid.

Whereupon it is ruled by the court here that the said defendant answer to the declaration aforesaid of them, the said plaintiffs, in the plea aforesaid or judgment will be rendered against it by default.

And thereupon the said defendant, by its attorney aforesaid, demands that the said plaintiffs shall furnish to it, the said defendant, a bill of particulars in the plea aforesaid.

Whereupon the said plaintiffs, by their attorney aforesaid, file in court here a bill of particulars as follows, to wit:

8 The bill of particulars referred to is omitted in pursuance of the following agreement, viz:

Agreement.

In the Circuit Court of the United States for the District of Maryland.

JOHN BURNS and JOHN G. NOAKES

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

It is agreed that in making up the record for the Supreme Court in the above case the clerk shall omit therefrom the bill of particulars filed, it being agreed that the same shows a claim for the sum of $29,923.20.

And it is further agreed that the clerk shall omit from said record the notices to produce papers, &c., dated, respectively, December 9th and December 11th, 1884.

JNO. J. DONALDSON,
Att'y for Plaintiffs.
JOHN K. COWEN,
Att'y for Defendant.

And thereupon, on the fifteenth day of December, in the year last aforesaid, the defendant aforesaid, by its attorney aforesaid, answers to the declaration aforesaid of the said plaintiffs in the plea aforesaid as follows, to wit:

In the Circuit Court of the United States for Cecil County. Dec. Term, 1884.

JOHN BURNS and JOHN G. NOAKES

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

The Defendant, The Baltimore and Ohio Railroad Company, by John S. Wirt, its attorney, says—

1st. That the defendant never was indebted as alleged.

9 2nd. And, for a second plea, the defendant says that it never promised as alleged.

3rd. And, for a third plea, the defendant says that before this action it satisfied and discharged the plaintiffs' claim by payment.

JOHN S. WIRT,
Att'y for B. & O. R. R. Co.

And thereupon the said defendant, by its attorney aforesaid, prays that the said plaintiffs may reply to the plea of it, the said defendant, in the action aforesaid.

Whereupon it is ruled by the court here that the said plaintiffs reply to the plea aforesaid of the said defendant to the declaration aforesaid or judgment will be rendered against them by default.

And thereupon, on the day and year last aforesaid, the said defendant, by its attorney aforesaid, files in court here the following suggestion and affidavit for removal, to wit:

In the Circuit Court for Cecil County. Dec. Term, 1884.

JOHN BURNS and JOHN G. NOAKES

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

To the honorable the judges of the circuit court for Cecil county:

10 The petition of The Baltimore and Ohio Railroad Company, the defendant in this case, by its vice-president, Samuel Spencer, respectfully suggests to this honorable court that it cannot have a fair and impartial trial in this court, and the said Samuel Spencer, vice-president as aforesaid, also believes said company cannot have a fair and impartial trial in this court, and that said company and said Samuel Spencer have come to such belief since the issue or issues have been made, and therefore pray the court to pass an order directing the removal of the records of proceedings in this cause to some other court for trial.

JOHN S. WIRT,
Attorney for B. & O. R. R. Co.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

On this 15th day of September, in the year eighteen hundred and eighty-four, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city, personally appears Samuel Spencer, vice-president of the Baltimore & Ohio Railroad Company, defendant in the above case, and makes oath on the Holy Evangely of Almighty God that the matters and things contained in the above suggestion are true to the best of his knowledge and belief.

WILLIAM CONN, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that William Conn, Esquire, — whom the
11 annexed affidavit was made and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 15th day of December, A. D. 1884.

[L. S.]

JAMES BOND,
Clerk of the Superior Court, Balto. City.

And now here, at this day, to wit, the twenty-second day of January, in the year one thousand eight hundred and eighty-five, the proceedings aforesaid having been heard and duly considered, it is ordered by the court here that a transcript of the record of proceedings in the plea aforesaid, with all things thereunto appertaining, be transmitted to the circuit court of the first judicial circuit of this State, to be held at the court-house, in the town of Cambridge, in and for Dorchester county, that the said last-mentioned court may proceed further therein and do as to justice doth appertain.

And the same is therefore transmitted accordingly.

Test: JAMES A. DAVIS, *Clerk.*

12 STATE OF MARYLAND, *Cecil County,* } *sct:*

I hereby certify that the aforegoing is a true and full transcript of the record of proceedings in the therein-entitled cause as full and complete as the same remains of record in the circuit court for Cecil county.

In testimony whereof I hereunto subscribe my name as clerk and affix the seal of said court, at Elkton, in said county, on this 31st day of January, A. D. 1885.

[L. S.]

JAMES A. DAVIS,
Clerk of the Circuit Court for Cecil County.

Plaintiffs' costs:

Att'y	$5 00
Cl'k	4 55
Sh'ff (Cecil)	3 60
" (Balt. city)	40
	$13 55

Defendant's costs:

Att'y	$5 00
Cl'k	2 45
Sh'ff (Cecil)	1 20
" (Balt. city)	40
	$9 05
Transcript	5 40
	$14 45

And thereupon the said defendant, by its attorney aforesaid, on the twenty-second day of April, in the year last aforesaid, files in our court here the following petition, affidavit, and bond for removal, to wit:

13 *Petition for Removal to the Circuit Court of the United States for the District of Maryland.*

In the Circuit Court for Dorchester County, State of Maryland.

JOHN BURNS and JOHN G. NOAKES

vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

Your petitioner, The Baltimore and Ohio Railroad Company, respectfully represents that the matter in dispute in this cause exceeds, exclusive of costs, the sum or value of five hundred dollars, and that this petition is filed at or before the term at which said cause could be first tried and before the trial thereof.

That this action is a suit of a civil nature between John Burns and John G. Noakes, as plaintiffs, who were at the commencement of this suit and still are citizens of the States of New Jersey and Pennsylvania, said Burns being a citizen of New Jersey and said Noakes being a citizen of Pennsylvania and not a citizen of the State of Maryland, and the Baltimore and Ohio Railroad Company, a corporation duly incorporated under the laws of the State of Maryland and a citizen of said last-named State.

Your petitioner has made and herewith files a bond, with good and sufficient surety, for its entering in the said circuit court for the district of Maryland aforesaid, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may
14 be awarded by the said circuit court if said court shall hold that this suit shall have been wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of Maryland; and it will ever pray.

JOHN S. WIRT,
Attorney for The Baltimore & Ohio Railroad Company.

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

Robert Garrett, being duly sworn, says that he is president of the Baltimore and Ohio Railroad Company, and that the statements and allegations contained in the foregoing petition are true to the best of his knowledge, information, and belief.

ROBERT GARRETT.

Subscribed and sworn to before me, a justice of the peace for the State of Maryland in and for Baltimore city, this fourth day of February, 1885.

WILLIAM CONN, *J. P.*

STATE OF MARYLAND, } *sct:*
Baltimore City, }

I hereby certify that William Conn, Esquire, before whom the annexed affidavit was made and who has thereto subscribed his
15 name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 5th day of February, A. D. 1885.

[L. S.]

JAMES BOND,
Clerk of the Superior Court of Baltimore City.

Know all men by these presents that we, The Baltimore & Ohio Railroad Company, as principal, and Wm. H. Ijams, as sureties, are held and firmly bound unto John Burns and John G. Noakes in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto the said John Burns and John G. Noakes, their representatives and assigns, we bind ourselves, our heirs, representatives, successors, and assigns, jointly and severally, firmly by these presents.

Whereas The Baltimore and Ohio Railroad Company has filed its petition in the circuit court for Dorchester county, State of Maryland, asking for the removal to the circuit court of the United States in and for the district of Maryland of a certain cause, wherein John Burns and John G. Noakes are plaintiffs and The Baltimore and Ohio Railroad Company is defendant:

16 Now, the condition of the above obligation is such that if the said Baltimore and Ohio Railroad Company shall enter in the said circuit court of the United States for the district aforesaid, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness the corporate names of the said Baltimore and Ohio Railroad Company, by Robert Garrett, its president, and its corporate seal and the names and seals of William H. Ijams, the 5th day of February, 1885.

[Seal of the B. & O. R. R. Co.]

THE BALTIMORE & OHIO
RAILROAD COMPANY,
By ROBERT GARRETT, *President.*
W. H. IJAMS. [SEAL.]

Attest: N. H. IJAMS, *Sec'ty.*

Attest as to signature—
E. J. D. CROSS.
2—581

This is to certify that I regard Wm. H. Ijams, the surety named in the above bond, a good and sufficient security, and if the same bond were tendered to me for that purpose I would approve it.

[L. S.] JAMES BOND,
Clerk Superior Court of Balto. City.

17 And thereupon, on the twenty-seventh day of April, in the year last aforesaid, the plaintiffs aforesaid, by Albert Constable and Daniel M. Henry, Junior, their attorneys, file in our court here their answer to the petition of the said defendant in the words and of the tenor following, to wit:

Trials.

In Circuit Court for Dorchester County. April Term, 1885.

BURNS & NOAKES
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } No. —.

The plaintiffs object to the motion for removal and removal of this cause to the U. S. circuit court as prayed for by the defendant for the reasons following, to wit:

1st. Because the petition for the removal was not filed before or at the term at which this cause could be first tried and before the trial thereof.

2nd. Because the controversy involved in this suit is not wholly between citizens of different States.

3rd. Because at the commencement of this suit the plaintiffs and defendant were both citizens of the State of Maryland.

4th. Because at the commencement of this suit John G. Noakes, one of the plaintiffs, was a citizen of Maryland.

5th. Because at the time of the bringing of this suit and of filing the petition for removal the plaintiffs were citizens of Maryland.

18 6th. Because at the commencement of this suit and of filing the motion for removal the plaintiff, John G. Noakes, was a citizen of Maryland.

ALBERT CONSTABLE,
D. M. HENRY, JR.,
Att'ys for Plaintiffs.

And now, here, at this day, to wit, the twenty-seventh day of April, in the year one thousand eight hundred and eighty-five, the proceedings aforesaid having been heard and duly considered by the court, the following order was passed, to wit:

Trials.

In the Circuit Court for Dorchester County. April Term, 1885.
Motion to Remove to U. S. C. C.

JOHN BURNS & JOHN G. NOAKES
vs.
THE BALTIMORE & OHIO R. R. Co. } No. 55.

Having heard argument from counsel upon the allegations of the petitioner and answer of respondent, and having examined the record transmitted from Cecil county circuit court to this court, this court is satisfied that the objection to the removal asked for because the motion comes too late, as the case could have been tried at the term at which it was removed to this court, cannot be sustained. The case was not at issue and the defendant was clearly entitled to time, if asked for, so that trial could not have been coerced. The petition makes a *prima facie* case for removal to U. S. C. C., and I should have no difficulty in the matter if the record did not disclose
19 the removal to this court to have been on the motion of the defendant, the present mover. I incline strongly to think that such action on defendant's part was a submission to the jurisdiction of the State courts at a time when he might have asserted his right to remove to the United States court, and such a submission as operated to waive his right to remove as now asked for; but finding no direct authority to sustain this view, and thinking the United States court the proper tribunal to pass on that question by remanding to this court, on motion of the plaintiffs, if the defendant by his action has lost his right to claim United States jurisdiction, I shall order the removal. It is, therefore, this 27th of April, 1885, ordered that the transcript and record of this case be removed and transmitted to the circuit — of the United States for the district of Maryland for disposition in that court.

LEVIN T. H. IRVING.

And the same is transmitted accordingly.
Test: CHARLES LAKE, *Clerk.*

STATE OF MARYLAND, *Dorchester County,* } *sct:*

I hereby certify that the aforegoing is a true and full transcript of the record of proceedings in the therein-entitled cause as full and complete as the same remains of record in the circuit court for Dorchester county.

20 In testimony whereof I hereunto subscribe my name and affix the seal of the circuit court for Dorchester county this 13 day of April, A. D. 1885.

[L. S.]

CHARLES LAKE,
Clerk Circuit Court for Dorchester Co.

Plaintiffs' costs in Dorchester county:

Clerk	$5 45
Sheriff Cecil Co.	80
" Balt. city	40
	$6 65

Defendant's costs in Dorchester Co.:

Clerk	$1 15
Transcript	8 95
	$10 10

And thereupon, on the said first Monday of November, 1885, come into the circuit court here the said plaintiffs, by Albert Constable and John J. Donaldson, Esquires, their attorneys, and the said defendant, by J. S. Wirt, J. K. Cowen, and H. L. Bond, Jr., Esquires, its attorneys.

Motion to Remand Case to the Circuit Court for Dorchester Co. Filed 2nd Nov., 1885.

In the Circuit Court of the United States for the District of Maryland.

BURNS & NOAKES *vs.* THE BALTIMORE & OHIO RAILROAD CO.

The plaintiff in the above-entitled cause respectfully moves the court to remand the record of the same to the circuit court
21 for Dorchester county for trial for the following reasons:

1st. Because the petition for the removal of said cause from said State court to this court for trial came too late.

2nd. Because one of the plaintiffs, namely, John G. Noakes, was at the time the said suit was instituted a citizen of Maryland.

ALBERT CONSTABLE,
Att'y for Pl'ffs.

Plea to the Petition of the Defendant for Removal. Filed 28th Nov., 1885.

In the Circuit Court of the United States for the District of Maryland.

BURNS & NOAKES *vs.* THE BALTIMORE AND OHIO R. R. CO.

The plaintiffs, by their attorney, Albert Constable, for a plea to the petition filed in this case by the defendant praying for the removal of this suit from the circuit court for Dorchester county to the circuit court of the United States for the district of Maryland, say

that at the time the above-entitled suit was instituted in the circuit court for Cecil county John G. Noakes, one of the
22 plaintiffs, was a citizen of Maryland and not a citizen of Pennsylvania.

ALBERT CONSTABLE,
Pl'ffs' Att'y.

On this 28 day of November, 1885, in open court, personally appeared John G. Noakes, and made oath that the plea hereto annexed is true in substance and in fact.

JAS. W. CHEW, *Clerk.*

Whereupon, all and singular the premises being seen and heard and by the court here fully understood, the said court made the following findings and passed the following order, to wit:

Order to Remand Case. Filed 5th March, 1886.

United States Circuit Court in and for the District of Maryland. November Term, 1885.

BURNS & NOAKES

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

This cause coming on for hearing upon the plea filed by the
23 plaintiffs in this court and their motion to remand this cause to the circuit court for Dorchester county, oral testimony as to the citizenship of the said John G. Noakes, one of the plaintiffs in the cause, was taken in open court, and the said plea and motion were argued by counsel for plaintiffs and defendant, respectively, and submitted to the court for consideration and decision, and the same having been duly considered, the court finds—

1. That the said John G. Noakes was not at the time of the institution of this suit and has not since become a citizen of the State of Maryland, but that both the plaintiffs in this cause are citizens of other States than the State of Maryland, and were so at the time of the institution of this suit.

2. The court is of opinion, upon the facts stated in the agreed statement of facts filed in the cause in this court for the purposes of the motion to remand and the facts disclosed by the record transmitted to this court from the circuit court for Dorchester county, that the defendant's petition for the removal of the case from said circuit court for Dorchester county into this court was not made in time to entitle the defendant to such removal under the statutes of the United States relating to the removal of causes from the courts of a State to the circuit court of the United States.

Therefore it is by the circuit court of the United States in and for the district of Maryland and by the authority thereof, this 5th day of March, 1886, ordered that the said motion be, and the same is

hereby, granted for the reason above stated, and that this
24 cause be, and it is hereby, remanded to the circuit court for Dorchester county with costs to plaintiffs.

THOS. J. MORRIS, *Judge.*

Defendant's Bill of Exceptions. Filed 3rd April, 1886.

At the hearing of the plaintiffs' motion to remand this case to the circuit court for Dorchester county, Maryland, the following agreed statement of facts was filed:

In the Circuit Court of the United States for the District of Maryland.

BURNS & NOAKES *vs.* BALTIMORE & OHIO R. R. CO.

It is agreed in the above case as follows:

1. That the circuit court for Cecil county holds four terms in each year, commencing, respectively, on the 3rd Monday of March, the 3rd Monday in June, the 3rd Monday in September, and the 2nd Monday in December.

2. That the second day of each term is a rule day and one intermediate day between each of said terms is also a rule day.

3. That the March, September, and December terms are jury
25 terms, when cases can be tried before juries. The June term is a non-jury or chancery term, and in all respects like the other terms, except that there is no jury in attendance.

4. That the term next succeeding the term at which the process in any suit is returned is the trial term and the cause can then be tried, unless said term at which the cause otherwise would stand for trial happens to be the June or non-jury term.

5. That the above cause was instituted in the circuit court for Cecil county in March, 1884, and defendant returned, summoned to the June term.

6. That the September term of said court, 1884, was the term at which said cause could have been first tried by the law of the State of Maryland, and the practice of said circuit court provided a declaration had been filed before the preceding rule day.

7. That in order to entitle a plaintiff to have his cause tried against the protest of a defendant at the term next succeeding the term at which the suit was brought and process served upon defendant it is necessary that a declaration should be filed in the cause not later than the rule day immediately preceding the said term.

8. That in this case the declaration was filed on the rule day in October, 1884—that is, the intermediate rule day between the September and December terms.

9. That this case stood on the trial docket of December term, 1884, and had the case not been removed to Dorchester county on petition of defendant could have been forced to trial at said term,
26 unless the defendant had got a continuance on the ground of absent witnesses.

10. That in this case if a declaration had been filed at any time on or before the rule day in August, 1884—that is, the intermediate rule day between the June and September terms—the case could have been forced to trial by the plaintiffs, notwithstanding the dissent of the defendant at the September term, 1884, unless the defendant obtained a continuance at that term on the ground that it had an absent witness, whose testimony was material and competent, and whom it had used due diligence, in the opinion of the court, to obtain.

JOHN S. WIRT,
Def'd't's Att'y.
ALBERT CONSTABLE,
JNO. J. DONALDSON,
For Pl'ffs.

Whereupon, after hearing argument by the counsel for the respective parties, the court passed the following order:

(The order above referred to is the same as found on page 31 of this record.)

To which ruling and action of the court in remanding this cause to the circuit court for Dorchester county aforesaid and the passage of said order therefor the defendant excepts and prays the court to sign and seal this its bill of exceptions, which is accordingly done this 3rd day of April, A. D. 1886.

THOS. J. MORRIS, *Judge.* [SEAL.]

27 *Prayer for Writ of Error and Order Thereon. Filed 3rd April, 1886.*

In U. S. Circuit Court, Dist. of Md.

JOHN BURNS and JOHN G. NOAKES

vs.

BALTIMORE & OHIO RAILROAD CO.

The defendant in this case prays a writ of error to the Supreme Court of the United States from the judgment remanding the case to the circuit court for Dorchester county, State of Maryland, and for such other process as may be requisite.

COWEN & CROSS,
HUGH L. BOND, JR.,
Att'ys for Def't.

3 APRIL, 1886.

Let the writ of error issue as prayed.

THOS. J. MORRIS, *Judge.*

And thereupon the said defendant, by its attorneys aforesaid, produced the writ of the United States of America for the correcting of errors of and upon the premises commanding that the judgment

aforesaid, so as aforesaid rendered, with all things thereunto relating, be transmitted to the Supreme Court of the United States to be held at Washington on the second Monday of October next, the tenor of which writ is as follows, to wit:

28 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maryland, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between John Burns and John G. Noakes, plaintiffs, and The Baltimore and Ohio Railroad Company, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 3d day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk of the Circuit Court of the United States for the Maryland District.

Allowed by—
JUDGE MORRIS.

28½ [Endorsed:] Burns & Noakes *vs.* Baltimore and Ohio R. Co. Writ of error.

The above writ of error was served by lodging a copy thereof for the plaintiff- in the clerk's office of said circuit court on this 3d day of April, 1886, within sixty days after the rendition of the judgment aforesaid.

JAS. W. CHEW,
Clk of said Circuit Court.

29 *Writ of Error Bond. Filed 5 April,* 1886.

Know all men by these presents that The Baltimore and Ohio Rail road Company, a body corporate under the laws of the State of Mary-

land, and W. H. Ijams, of Baltimore city, Maryland, are held and firmly bound unto John Burns and John G. Noakes in the sum of five hundred dollars, current money, to be paid unto the said John Burns and John G. Noakes, their executors, administrators, or assigns; to the payment of which, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with the corporate seal of said company and with the seal of the said W. H. Ijams. Dated this 3rd day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately in the circuit court of the United States for the district of Maryland, in a cause in said court wherein the said John Burns and John G. Noakes were plaintiffs and the said Baltimore and Ohio Railroad Company was defendant, a judgment was rendered against the said defendant, from which said judgment the said defendant has sued out a writ of error to the next term of the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if
30 the said Baltimore and Ohio Railroad Company shall cause a transcript of the record and proceedings of the said circuit court to be transmitted to the said Supreme Court within the time appointed by law and shall prosecute its said appeal with effect and pay all costs of said circuit court in case it shall fail to make good its plea and pay all damages and costs that may be adjudged against it in the said Supreme Court, then this obligation shall be void; otherwise to be and remain in full force and virtue.

[L. S.] THE BALTIMORE & OHIO RAILROAD COMPANY,
By SAMUEL SPENCER,
Vice-President.
W. H. IJAMS. [SEAL.]

Attest: W. H. IJAMS, *Secretary.*

Signed, sealed, and delivered in presence of—
H. L. BOND, JR.,
As to W. H. Ijams.

The foregoing bond is thus endorsed, to wit: "Bond approved. Hugh L. Bond, c't judge."

In pursuance whereof and according to the statute in such case made and provided a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said Supreme Court accordingly.

31 The United States of America to John Burns and John G. Noakes, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the district of Maryland, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas J. Morris, judge of the Maryland district, this 5th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[The Seal of the Circuit Court, Maryland.]

THOS. J. MORRIS, *Judge.*

Service admitted on this 8th day of May, 1886.

JAS. T. DONALDSON,
Att'y for Pl'ff.

[Endorsed:] S. Burns, &c., *vs.* B. & O. R. Co. Citation. (Have Mr. Donaldson admit service for pl'ff.)

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally appeared —— —— before me, the subscriber, —, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

32 UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I hereby certify that the foregoing is a full and true transcript of the record and proceedings of the circuit court of the United States for the fourth circuit in and for the district of Maryland in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this fourteenth day of June, A. D. 1886.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Maryland C. C. U. S. No. 581. The Baltimore and Ohio Railroad Company, plaintiff in error, *vs.* John Bur and John C. Nokes. Filed July 2, 1886.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff in Error,
vs.
JOHN BURNS AND JOHN G. NOAKES,
Defendants in Error.

IN THE
Supreme Court
OF THE
UNITED STATES.
OCTOBER TERM, 1887.
No. 881.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This is an appeal from the order of the Circuit Court of the United States for the District of Maryland remanding this case to the Circuit Court for Dorchester County, Maryland, whence it had been removed under the Act of March 3, 1875, by the Plaintiff in error, the Defendant below. The suit was begun February, 1884, in the Circuit Court for Cecil County, Maryland, "by titling," that is, by the plaintiffs suing out a writ of summons against the defendant, without filing any declaration or complaint [Record p. 2.] The first summons was returned "non est;" but an alias writ returnable to the June Term of the Court was returned "summoned" [Record p. 3.] There are four terms in the Cecil County Court, namely, the March, June, September and December Terms, of which the June Term is a Chancery Term with no jury in attendance. The second day of each term is a rule day, and one intervening day is also a rule day [Record p. 14.]

At the June Term no declaration was filed in this case, no appearance entered for the defendant, and the case was entered "continued" to the September term [Record p. 3.] At the first rule day of the September term there was again no declaration by the plaintiffs, or appearance by the defendant, and the case was again continued to the December Term [Record p. 3.] However, at the intervening rule day before the December term the plaintiffs filed their declaration. It became thereupon the duty of the defendant to appear and plead or demur to the declaration at the December term to which the case had been continued. This the defendant did, and the case was duly entered on the trial docket for that term [Record pp. 4 & 5.] During this same December term, the Court on petition of the defendant, transmitted the record in the case to the Circuit Court for Dorchester County for trial, in accordance with the provisions of Section 8 of Article 4 of the Constitution of Maryland, as amended under the Act of April 11, 1874, Maryland Laws, 1874, Ch. 364. [Record pp. 6 & 7.]

The current term of the Dorchester County Court was its January term, and this case, when transmitted to that Court, took its place on the trial docket by virtue of the terms of the constitutional provision, just as a case ready for trial that had been begun in that Court. The terms of that Court are fixed by Section 74 of Article 10, Maryland Code Public Local Laws, title "Dorchester County," which is as follows:

"74. There shall be four terms of the Circuit Court for Dorchester County in each year, commencing on the fourth Monday in each of the months of January, April and July, and the second Monday of November."

At this same January term of the Dorchester County Court the defendant filed its petition and bond for removal of the

case to the Circuit Court of the United States for the Distric[t] of Maryland, under the Act of March 3, 1875 [Record pp. 8-11.] The State Court granted the removal, but the Circuit Court remanded the case on the ground that the petition for removal was not filed in time under the Act of 1875 [Record p. 13.]

Assignment of Error.

To the ruling and order of the Circuit Court in remanding the case the defendant excepted, and assigns the same as error.

Points of Law.

The defendants in error base their argument on the ground that the *September* term was the term at or before which the petition for removal should have been filed. At the September term no declaration had been filed by the plaintiffs and no appearance entered by the defendant; the only proceedings in the case had been the issuing and return of the writ of summons. There was nothing unusual in the delay of the plaintiffs in filing their declaration. No rule of the court required a declaration to be filed before it was filed, and the case was certainly not in law triable until a declaration had been filed. It is submitted that the *December* term was the trial term of this case, and not the September term, as contended by defendants in error, under the rule laid down in Pullman Palace Car Co. vs. Speck, 113 U. S. 87.

The cases cited by defendants in error in their brief filed lend no support to the proposition that a defendant must appear and remove a suit upon the mere service of a summons upon him, before the plaintiff has furnished any statement of his cause of action, or otherwise the defendant will lose his right to remove.

There seemed to be some doubt in the mind of the State Court as to whether the transmittal from the Cecil County Court to the Court of Dorchester County might not be a waiver by the defendant of its right to remove. Although the defendants in error in their brief do not contend that the transmittal of this case for trial from one court to the other in any way affected the right to remove it, still it may be well to state briefly the ground taken by the plaintiff in error on that point. Taking it as conceded that the December term of the Cecil Court was the trial term, the effect of the transmittal of the case to the Dorchester Court was simply to substitute the pending term of the Dorchester Court as the trial term of the case, in the stead of the December term of the Cecil Court. This is clear from the terms of the constitutional provision itself, as well as from the form of entries in the record. The provisions of the 8th Section of Article 4 of the Constitution, as amended under ch. 364 Md. Laws 1874, so far as they relate to civil cases, are as follows:

"Sec. 8. The parties to any cause may submit the same to the Court for determination without the aid of a jury, *and in all suits or actions at law*, issues from the Orphans' Court, or from any Court sitting in equity, and in all cases of presentments or indictments for offences, which are or may be punishable by death, *pending in any of the Courts of law in this State*, having jurisdiction thereof, upon suggestion in writing under oath *of either of the parties* to said proceedings, that such party cannot have a fair and impartial trial in the Court in which the same may be pending, *the said Court shall order and direct the record of proceedings in such suit or action*, issue, presentment or indictment, *to be transmitted to some other Court having jurisdiction in such case for trial*; . . . and such right of removal shall exist upon suggestion in cases when all the judges of said Court may be disqualified under the provisions of this Constitution to sit in any such case;

and said Court, to which the record of proceedings in such suit or action, issue, presentment or indictment may be so transmitted, *shall hear and determine the same in like manner as if such suit or action, issue, presentment* or indictment *had been originally instituted therein;* and the General Assembly shall make such modification of existing law as may be necessary to regulate and give force to this provision."

The Court will notice that no continuance is entered in the case, but the order is that it be transmitted for trial to the Dorchester Court, "and said Court," to quote from the constitutional provision, "to which the record of proceedings in such suit or action may be so transmitted, shall *hear and determine the same in like manner as if such suit or action had been originally instituted therein.*" The removal is not to any particular term of the Dorchester Court, there is no new term in the case, no continuance entered, but the case goes from one Court to the other and may be called up for trial in the court to which it is removed immediately upon the filing of the record therein. In short, the January Term of the Dorchester Court was by operation of this law substituted for the December term of the Cecil Court, as the trial term of this case. It follows that the application for removal to the United States Court, which was made to the January Term of the Dorchester Court, was made in time. There had been no other trial term in this case.

Moreover, in deciding whether a petition for removal has been filed in time, under the 3rd section of the Act of March 3, 1875, only the proceedings in the State Court from which the removal is sought, are to be considered. The language of that section is "That whenever either party" "shall desire to remove such suit *from a State Court* to the Circuit Court of the United States, he or they may make and file a petition in such suit, *in such State Court, before or at the term at which said cause could be first tried*, and before the trial thereof, for the

removal of such suit into the Circuit Court to be held in the district when such suit is pending."

The petition must be filed where? "In such State Court, *i. e.*, the State Court from which the party desires to remove." "Before or at the term at which said cause could be first tried." Term of what Court? Tried where? Why, "in such State Court," *i. e.*, the Court from which the removal is sought.

There must have been no trial of the case. There can be no removal from an Appellate Court. But it is from the trial Court in which the suit is pending that the party desires to remove the suit. It is only as to that Court that he exercises his right to prefer the Federal tribunal, and it is only to the proceedings in that Court that the law looks to see whether he has exercised his right in time. To construe the law otherwise would be to construe into it a defect that does not, in fact, exist. For instance, suppose that after this case had been transmitted to the Dorchester County Court on the application of the defendant, the plaintiffs had discovered circumstances affecting the Dorchester Court which did not affect the Cecil Court, and which would perhaps deprive them of a fair trial in the Dorchester Court, would they have lost their right to seek the protection of the Federal Court? Under the letter of the Act of 1875, no such *casus omissus* exists. What good purpose can be served by departing from the letter of it?

Again, it was in the power of the plaintiff, as well as the defendant, to cause the case to be transmitted from one county Court to another. If in this case the plaintiff had exercised that right, surely this Court could not hold that the defendant had lost its right to remove the case to the United States Court, provided its application was filed at the then pending term of the Dorchester Court. But unless the plaintiff in error is right in its contention as to the effect of the removal

from one State Court to the other, the plaintiff would have the power to bar the removal of the case to the United States Court by the defendant, because there would have already been a trial term in the case. The effect of such removal from one State Court to another must be the same, whether it is done at the instance of one party or the other.

No question of waiver or submission to the State jurisdiction can arise. In every case of removal, under the Act of March 3, 1875, the sole question is whether the party removing has complied with the requirements of that Act in the time and manner of his application for removal; if he has so complied then his right to remove under that Act is absolute. The only election that the removing party can be called on to make is between the Federal Court and the State Court in which the suit is pending when the petition for removal is filed. *Non constat*, that the same reasons for exercising the right of removal to the Federal Court existed in regard to a different State Court in which the case was formerly pending. Under the provision of the Maryland Constitution, the Court determines to what other Court the case shall be transmitted for trial. It is submitted that the defendant had not lost its right to remove this case to the United States Court, and that the order of the Circuit Court of the United States for the District of Maryland remanding the case to the State Court should be reversed.

JOHN K. COWEN,

HUGH L. BOND, JR.,

Of Council for Plaintiff in Error.

124-16

Office Supreme Court U. S.
FILED.
OCT 31 1887
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

NO. 581.

BALTIMORE & OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR.

vs.

JOHN BURNS AND JOHN G. NOAKES,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR, AND NOTICE OF MOTIONS.

ALBERT CONSTABLE,
Counsel for Defendants in Error.

Supreme Court of the United States.

NO. 581.

BALTIMORE & OHIO RAILROAD COMPANY,

vs.

JOHN BURNS AND JOHN G. NOAKES,

To the Baltimore & Ohio Railroad Company, Plaintiff in Error, in said cause, and John K. Cowen its Solicitor.

Take notice that at the opening of said Court on the day of or as soon thereafter as the same can be reached, I will on behalf of John Burns and John G. Noakes, Defendants in Error, move said Court, in the court room thereof in Washington, D. C., to advance said cause on the Calender of said Court, and to submit the same for decision on the Brief of the Appellee, a copy of which is hereto attached.

Also take notice, that at the same time and place, I will move said Court to affirm the order appealed from on the ground that said writ of Error was taken for delay only, and because the question on which the jurisdiction depends is so frivolous as not to need further argument; which motion will also be submitted on the Brief hereto attached.

Respectfully,

ALBERT CONSTABLE,

Counsel for Defendants in Error.

Supreme Court of the United States.

NO. 581.

BALTIMORE & OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR.

vs.

JOHN BURNS AND JOHN G. NOAKES,
DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

This action was instituted by Burns & Noakes against the B. & O. R. R. Co., in the Circuit Court for Cecil County, Maryland, in March, 1884, and the defendant was returned summoned, and appeared by Counsel, to the June Term of that year.

The Circuit Court for Cecil County has four terms a year, namely, in June, in September, in December, and in March—all, except the June Term, being terms at which juries attend. By the law and the practice of the Court, this cause would first have stood for trial and could have been tried at the September Term next succeeding the June Term to which the defendant was summoned. At the September Term, however, the cause was continued to the December Term, at which latter Term, although Defendants in Error were pressing for trial, Plaintiff in Error had the case, upon its petition and affidavit, removed to the Circuit Court for Dorchester County.

After the case reached the Circuit Court for Dorchester County, Plaintiff in Error presented its petition for a removal into the United States Court at Baltimore, and the removal was made.

Afterwards, upon motion of the Defendants in Error, the Uuited States Court at Baltimore remanded the case to the Circuit Court for Dorchester County, upon the ground that the petition for removal

had not been presented in time. Whereupon the Plaintiff in Error brings the Record into this Court.

See agreed statement of facts folio pp. 24, 25, 26 of the Transcript.

That statements of facts shows, that the September Term of the Circuit Court for Cecil County was the Term at which Plaintiff in Error was bound to file its petition, if it wished the cause removed into the United States Court. That was the Term of the State Court at which the cause first stood for trial, and could have been tried. But the Plaintiff in Error did not then file its petition, or even at the December Term.

In Gregory vs. Hartley, 113 U. S., at p. 745, this Court said: "The Act of March, 1875, ch. 137, sec. 3, which governs this case, provides that the petition for removal must be filed at or before the Term at which the cause could be first tried, and before the trial. This has been construed to mean the first Term at which the cause is in law *triable*—the first Term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations. Babbitt vs. Clarke, 103 U. S., 606; Pullman Palace Car Co. vs. Speck Ante, p. 87."

These authorities dispose of the case, and the order of Court below should, therefore, be affirmed.

ALBERT CONSTABLE,

Counsel for Defendants in Error.

24-10
104-165

OCT 31 1887

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 581.

The Baltimore & Ohio Railroad Co.

Plaintiff in Error,

VS.

John Burns and John G. Noakes,

Defendants in Error.

Brief of Plaintiff in Error on motion of Defendants in Error to affirm.

JOHN K. COWEN,

HUGH L. BOND, Jr.,

Of Counsel for Plaintiff in Error.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff in Error,
vs.
JOHN BURNS AND JOHN G. NOAKES,
Defendants in Error.

IN THE
Supreme Court
OF THE
UNITED STATES.
OCTOBER TERM, 1887.
No. 581.

Brief of Plaintiff in Error on motion of Defendants in Error to affirm.

This is an appeal from the order of the Circuit Court of the United States for the District of Maryland remanding this case to the Circuit Court for Dorchester County, Maryland, whence it had been removed under the Act of March, 3 1875, by the Plaintiff in error the Defendant below. The suit was begun February, 1884, in the Circuit Court for Cecil County, Maryland, "by titling," that is, by the plaintiffs suing out a writ of summons against the defendant, without filing any declaration or complaint. The first summons was returned "non est;" but an alias writ returnable to the June Term of the Court was returned "summoned." There are four terms in the Cecil County Court, namely, the March, June, September and December Terms, of which the June Term is a Chancery term with no jury

in attendance. The second day of each term is a rule day, and one intervening day is also a rule day.

At the June Term no declaration was filed in this case, no appearance entered for the defendant, and the case was entered "continued" to the September term. At the first rule day of the September term there was again no declaration by the plaintiffs, or appearance by the defendant, and the case was again continued to the December Term. However, at the intervening rule day before the December term the plaintiffs filed their declaration. It became thereupon the duty of the defendant to appear and plead or demur to the declaration at the December term to which the case had been continued. This the defendant did, and the case was duly entered on the trial docket for that term. During this same December term, the Court on petition of the defendant, transmitted the record in the case to the Circuit Court for Dorchester County for trial, in accordance with the provisions of Section 8 of Article 4 of the Constitution of Maryland.

The current term of the Dorchester County Court was its January term, and this case, when transmitted to that Court, took its place on the trial docket by virtue of the terms of the constitutional provision, just as a case ready for trial that had been begun in that Court. The terms of that Court are fixed by Section 74 of Article 10, Maryland Code Public Local Laws, title "Dorchester County," which is as follows: "74. There shall be four terms of the Circuit Court for Dorchester County in each year, commencing on the fourth

Monday in each of the months of January, April and July, and the second Monday of November."

At this same January term of the Dorchester County Court the defendant filed its petition and bond for removal of the case to the Circuit Court of the United States for the District of Maryland, under the Act of March 3, 1875. The State Court granted the removal, but the Circuit Court remanded the case on the ground that the petition for removal was not filed in time under the Act of 1875.

The defendants in error base their argument upon this motion on the ground that the *September* term was the term at or before which the petition for removal should have been filed. At the September term no declaration had been filed by the plaintiffs and no appearance entered by the defendant; the only proceedings in the case had been the issuing and return of the writ of summons.

There was nothing unusual in the delay of the plaintiffs in filing their declaration, no rule of the court required a declaration to be filed before it was filed, and the case was certainly not in law triable until a declaration had been filed.

It is submitted that the *December* term was the trial term of this case, and not the September term, as contended by defendants in error, under the rule laid down in Pullman Palace Car Co., vs. Speck, 113 U. S. 87.

The cases cited by defendents in error in the brief filed on this motion lend no support to the absurd

proposition that a defendant must appear and remove a suit upon the mere service of a summons upon him before the plaintiff has furnished any statement of his cause of action, or otherwise the defendant will lose his right to remove.

There seemed to be some doubt in the mind of the State Court as to whether the removal from the Cecil County Court to the Court of Dorchester County might not be a waiver by the defendant of its right to remove. Although the defendants in error in their brief on this motion do not contend that the transmittal of this case for trial from one court to the other in any way affected the right to remove it, still it may be well to state briefly the ground taken by the plaintiff in error on that point. Taking it as conceded that the December term of the Cecil Court was the trial term, the effect of the transmittal of the case to the Dorchester Court was simply to substitute the pending term of the Dorchester Court as the trial term of the case, in the stead of the December term of the Cecil Court. This is clear from the terms of the constitutional provision itself, as well as from the form of entries in the record. The provisions of the 8th Section of Article 4 of the Constitution, so far as they relate to civil cases, are as follows: "Sec. 8. The parties to any cause may submit the same to the Court for determination without the aid of a jury, *and in all suits or actions at law*, issues from the Orphans' Court, or from any Court sitting in equity, and in all cases of presentments or indictments for offences, which are or may be punishable by death, *pending in any of the Courts of law in this State*, having jurisdiction

thereof, upon suggestion in writing under oath of either of the parties to said proceedings, that such party cannot have a fair and impartial trial in the Court in which the same may be pending, *the said Court shall order and direct the record of proceedings in such suit or action*, issue, presentment or indictment, *to be transmitted to some other Court having jurisdiction in such case for trial;* . . . . and such right of removal shall exist upon suggestion in cases when all the judges of said Court may be disqualified under the provisions of this Constitution to sit in any such case; *and said Court*, to which the record of proceedings in such suit or action, issue, presentment or indictment may be so transmitted, *shall hear and determine the same in like manner as if such suit or action, issue, presentment* or indictment *had been originally instituted therein;* and the General Assembly shall make such modification of existing law as may be necessary to regulate and give force to this provision."

The Court will notice that no continuance is entered in the case, but the order is that it be transmitted for trial to the Dorchester Court, "and said Court," to quote from the constitutional provision, "to which the record of proceedings in such suit or action may be so transmitted, shall *hear and determine* the same in like manner as if such suit or action had been originally instituted therein." The removal is not to any particular term of the Dorchester Court, there is no new term in the case, no continuance entered, but the case goes from one Court to the other and may be called up for trial in the Court to which it is removed immedi-

ately upon the filing of the record therein. In short, the January Term of the Dorchester Court was by operation of this law substituted for the December Term of the Cecil Court, as the trial term of this case. It follows that the application for removal to the United States Court, which was made to the January Term of the Dorchester Court, was made in time; there had been no other trial term in this case.

Again, it was in the power of the plaintiff, as well as the defendant, to cause the case to be transmitted from one county Court to another. If in this case the plaintiff had exercised that right, surely this Court could not hold that the defendant had lost its right to remove the case to the United States Court, provided its application was filed at the then pending term of the Dorchester Court. But unless the plaintiff in error is right in its contention as to the effect of the removal from one State Court to the other, the plaintiff would have the power to bar the removal of the case to the United States Court by the defendant, because there would have already been a trial term in the case. The effect of such removal from one State Court to another must be the same whether it is done at the instance of one party or the other.

No question of waiver or submission to the State jurisdiction can arise. In every case of removal, under the Act of March 3, 1875, the sole question is whether the party removing has complied with the requirements of that Act in the time and manner of his application for removal; if he has so complied then his right to remove under that Act is absolute.

Of course such a case as the present could have arisen only out of mistake which is not likely to occur again. It is submitted that in spite of the mistaken removal from one State Court to another the defendant had not lost its right to remove this case to the United States Court, and that the order of the Circuit Court of the United States for the District of Maryland remanding the case to the State Court should be reversed.

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Of Counsel for Plaintiff in Error.